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In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* STATES OF CALIFORNIA, CONNECTICUT, IOWA, MAINE, MARYLAND, NEW MEXICO, NEW YORK, WASHINGTON, AND VERMONT IN SUPPORT OF CROSS-RESPONDENTS

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INTEREST OF *AMICI* STATES

The interest of *amici* States in this case is real and immediate, as real as the decision as to which industries to control and how much in order to be able to meet a federal standard, and as immediate as the asthma attack that takes a child from the softball field to the hospital on a hot summer day. As the "hands-on" partners in the complex Federal-State partnership forged by the Clean Air Act ("the Act" or "the CAA"), it is the States that must devise the control strategies, develop and enforce the permits, and pass the legislation necessary to meet and maintain the National Ambient Air Quality Standards ("NAAQS"). It is also the States that must cope with the health effects on their citizens that result from air pollution, and that are most answerable to their citizens for either the success or the failure of air pollution control in this country.

Thirty years ago, the Act established the basic principle that there would be nationwide, health-based, federally-established air quality standards, and that States would develop and enforce the plans to meet them. Since that time, all fifty States have structured their air pollution control programs around those nationwide standards and the plans by which States meet them. The regulatory structures of every State are based, overall, on the Clean Air Act's requirement that States meet the health-based NAAQS. Some States do not even have their own independent air quality standards, but simply use the NAAQS as their benchmarks.[1] Many States, like *amicus*

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[1] *See, e.g.*, New Hampshire (N.H. Code Admin. R. Env-A 301.03(c) (defining ambient air quality standards as the level "designated by the Administrator of the EPA which is judged as necessary to protect the public health"); Vermont (Reg. 5-301 (stating that "[t]he ambient air quality standards contained in this subchapter are based on national ambient air quality standards, where such national standards exist"). *See also* Pennsylvania (Pa. Stat. § 4044.2 (1999)) (requiring that State

California, set their own, more stringent, independent standards.[2] Many States set their standards, whether at NAAQS level or more stringently, pursuant to State statutory mandates to protect the "public health" such as the one that the Court is asked here to interpret.[3] To decide at this late date that the NAAQS have from the outset been set by the wrong standard – the ineluctable result of reversing the Court of Appeals' decision here – would throw into doubt and chaos the settled expectations and the air pollution control apparatus of the entire nation.

A point that is often overlooked but that is critical for understanding the Act is that no NAAQS is directly enforceable. *Coalition Against Columbus Center v. City of New York*, 967 F.2d 764, 769-71 (2d Cir. 1992). A NAAQS becomes enforceable only when a State turns that NAAQS into a control strategy, regulations, and actual, enforceable permits and restrictions. It is virtually impossible to overstate the detail and extent of the laws, regulations, permits, and decisions that have been based upon the NAAQS, and that are embodied in the State Implementation Plans ("SIPs") to meet and maintain the NAAQS that the States prepare and submit to the United States Environmental Protection Agency ("EPA").[4]

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standards be "no more stringent" than federal standards, with the result that the State standards necessarily are identical to the federal standards).

[2] *See, e.g.*, California (Cal. Health and Saf. Code § 39606); Colorado (Colo. Rev. Stat. § 25-7-108) (setting non-federal standard for visibility); North Carolina (N.C. Gen. Stat. § 143-215.107(b)).

[3] *See, e.g.*, Massachusetts (Mass. Gen. Law. ch. 310, § 6.02(1)); New Jersey (N.J. Admin. Code tit. 7, § 7:27-13.1); Wisconsin (Wis. Stat. § 285.01(9)).

[4] While California is not a typical State, in physical size, in population, or in the tenacity of its air pollution problems, the size of California's SIP gives an idea of the magnitude of the regulatory edifice that rests on the NAAQS. The last complete

A SIP begins with establishing the many separate air quality control regions or planning areas with a State; planning by separate areas is necessary because the meteorology, topography and type of pollutant sources vary by region. Using California as an example of a large State, it has fifteen different air quality planning areas and thirty-five air districts for which air quality planning is done. Colorado, as an example of a smaller State, has thirteen air quality control regions, but does separate planning for its five nonattainment areas for carbon monoxide, seven nonattainment areas for particulate matter, and one nonattainment area for ozone. Each area has a separate control strategy for each pollutant, since different regions will have varying problems with, and goals for, different pollutants (e.g., urban areas will probably have to focus on ozone reduction or particulate emissions from trucks and cars, while rural areas may be more concerned with preserving visibility). Each control strategy within each region must be embodied in rules and regulations directed at each of the six pollutants covered by a NAAQS, and some pollutants require statewide regulations as well (e.g., automotive emissions standards for California and the Northwest States). Finally, permits must be issued for individual sources that govern their day-to-day operation. The NAAQS and the SIPs designed to meet them, permeate every county, city, borough, and town in every State, and have been forged only through extensive and often painful technical and policy choices.

Should the Court reverse the decision below, every SIP and all its component parts may be cast into doubt. The SIPs are focused on attainment and maintenance of the NAAQS; if the Court decides that EPA has always

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SIP filed by California with EPA, not counting amendments that are filed as needed, was filed in 1994; that SIP filled *twenty-six banker's boxes*. Not included in those twenty-six boxes were regulations aimed solely at enforcing those air quality standards set by California that are more stringent than required to meet the NAAQS.

misunderstood how the NAAQS are to be set, every SIP could be open to challenge. It is not fanciful to expect that industry petitions will flood EPA, and thence the courts, seeking to overturn each and every NAAQS, as well as every regulation, rule, and permit based on those NAAQS. What is now a solid and comprehensive regulatory structure could suddenly become a house of cards, ready to topple, with every rule and every permit potentially in doubt.

Further, State air quality standards might similarly be cast into doubt. As set out, *supra*, many States rely principally on the NAAQS to define air quality and do not set independent air quality standards, or rely on statutory language identical to that found in the relevant section of the Act to set their standards. Those States would suddenly find themselves without an authoritative basis for their air pollution programs. Some States set their own air quality standards, but base them on health protection, following what has always been perceived as the model of the Clean Air Act.[5] These States can anticipate that their independent state standards will be next in line for an industry challenge, should the Court accept industry's invitation to establish a court-made rule that air quality standards cannot rationally be set without consideration of compliance costs. The States would face the front-line problems of protecting the health of their citizens from the very real dangers of air pollution while the Congress and EPA scrambled to respond to such a rule, whether with new legislation, new NAAQS, or both. The setting of a NAAQS is a lengthy process now; it would be more so if the basis for each of the NAAQS had to be reevaluated, and that new basis inevitably litigated. Reevaluation of

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[5] *See, e.g., Western Oil & Gas Ass'n v. Air Resources Board*, 37 Cal.3d 502, 516-19 (1984) (holding that California's Air Resources Board is not to consider costs in setting ambient air quality standards, and citing, *inter alia*, the federal Clean Air Act and federal case law similarly construing the NAAQS, as authority for its conclusion).

the basis for setting the NAAQS could cause this country to drift for many years with literally no national plan for ensuring air quality, before new NAAQS could be set, new rules for meeting them developed, new SIPs drafted, and permits crafted all over again.

Meanwhile, States would have the continuing responsibility for ensuring that their residents breathe healthy, safe air. The health of their residents and the integrity of their air pollution regulatory schemes comprise the interest of *amici* States.

SUMMARY OF ARGUMENT

Industry Cross-Petitioners and their *amici*, particularly *amicus* General Electric, have issued to the Court a stunningly frank and open invitation to legislate. They plainly and forthrightly ask the Court to rewrite thirty years of unanimous interpretation of the Clean Air Act by courts, by the agency charged with administering it, and – most important – by Congress. Cross-Petitioners and their *amici* seek to replace the health-protective philosophy upon which the NAAQS have always been based, as interpreted in *Lead Industries v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), *cert. denied sub nom., Lead Industries v. EPA*, 449 U.S. 1042 (1980), with the current cost-based, monetized philosophy they think Congress should have employed to attack the problem of air pollution.

Petitioners' argument rests solely on a tortured, out-of-context reading of one or two phrases in the Act, together with a plethora of articles and arguments by certain contemporary economists and theoreticians who seek to rewrite the Act to conform to their own cost-benefit preferences for public policy. By contrast, the relevant portion of the decision below rests on straightforward language in the Act, copious legislative history, internal structural evidence in the Act, and decades of consistent and unbroken interpretation by both the agency responsible for administering the Act and the courts charged with interpreting it. The text and structure

of the Clean Air Act demonstrate that, where Congress intended costs to be taken into account, it said so explicitly, and gave precise and detailed instructions as to how to do so. The total absence of any such provision or directions demonstrates that Congress did not intend costs to be considered in the setting of the national standards. Further, Congress intended the Act to force technology, making it difficult to rationally predict costs.

Amici States believe that this is an apt case for the application of a *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), step one, analysis: Congress has spoken to this question directly, and where Congress has so spoken, the courts are bound to carry out Congress' expressed intent. To hold for industry here would be to go back not just thirty years to before Congress passed the Act, but to return to pre-*Chevron* days; industry here asks the Court to impose its own conception of public policy upon statutes, regardless of the intent of the democratically elected Congress.

ARGUMENT

I.

COMPARISON OF SECTION 109(b) WITH OTHER SECTIONS OF THE ACT SHOWS THAT, WHERE CONGRESS INTENDED COSTS OF COMPLIANCE TO BE TAKEN INTO ACCOUNT, IT SAID SO AND PROVIDED DIRECTIONS ON HOW TO DO SO. THE ABSENCE OF SUCH DIRECTIONS IN SECTION 109(b) MEANS THAT CONGRESS DID NOT INTEND COSTS TO BE TAKEN INTO ACCOUNT

In *Union Electric Co. v. Environmental Protection Agency, et al.*, 427 U.S. 246, 256, n. 5 (1976), the Court held that a comparison between different sections of the Act could illuminate the intent of Congress as to consideration of costs or feasibility. Such a comparison is very enlightening here. Comparison between Section 109(b)(1) and other sections of the Act shows that, where Congress

did intend costs to be taken into account, it not only said so explicitly, but gave specific, fairly comprehensive instructions to the Administrator as to how to do so. The absence of any instructions, let alone any that resemble the detailed ones found in other provisions of the Act, shows convincingly that Congress did not intend compliance costs to be among the factors the Administrator considers when setting the NAAQS.

Two examples suffice. When it ordered EPA to set standards of air pollution control performance for new major stationary sources of emissions (the New Source Performance Standards, or NSPS), Congress required EPA to set standards:

> "which reflect[ ] the degree of emission limitation achievable through the application of the best system of emission reduction which (*taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirement)* the Administrator determines has been *adequately demonstrated.*"

CAA Section 111(a)(1), 42 U.S.C. § 7411(a)(1) (emphasis added). Thus, the Administrator must determine that a technology has been demonstrated, and is not simply theoretical, before requiring it, and must consider the monetary costs of compliance, must consider collateral health and environmental harms and benefits, and must consider any effects on energy. Section 111 also contains directions from Congress to the Administrator on how to set priorities for establishing new NSPS standards, when work rules could be used instead of a standard of emissions control, and how and when to waive the NSPS in order to allow new technology to be demonstrated. The factors to be considered by the agency under Section 111, and the instructions as to how that agency should consider these factors when making rules, are comprehensive, wide-ranging, and thorough.

Similarly, when Congress overhauled the Act in the 1990 Amendments, it set up a new approach to control of hazardous air pollutants, and was extremely careful to

provide the Administrator with precise directions as to when and how she should consider costs. Section 112(d)(2), for example, provides in pertinent part:

> "Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources. . . . "

CAA § 112(d)(2), 42 U.S.C. § 7412(d)(2). Section 112(d)(3) gives additional, extremely explicit directions as to what reduction technology may be considered achievable, including percentages of sources and timetables. Congress specified that:

> "The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. . . . "

CAA § 112(d)(3), 42 U.S.C. § 7412(d)(3). Section 112(d)(3) goes on to provide in almost minute detail what standards the Administrator must set, what percentage of sources must have achieved a given level of emissions reduction by a given time before that degree of control will be considered achievable, and how many sources must have achieved a given level of emissions reduction before the Administrator may set such level as a standard under Section 112, all factors that clearly go to cost and feasibility of compliance. *See also* Part D, Subpart 2, 42 U.S.C. §§ 7511, *et seq.*, where Congress itself did the balancing and comprehensively listed control measures that States must adopt for nonattainment areas, according

to the degree of severity of the nonattainment problem in each category of area.

Moreover, in Section 112(f)(2), Congress directly spoke to the issue of balancing health risks from hazardous air pollutants and costs of compliance, ordering the Administrator to set further hazardous pollutant emissions standards under specified circumstances. Section 112(f)(2) requires EPA to adopt these emissions standards:

> "if promulgation of such standards is required in order to provide an ample margin of safety to protect public health and welfare in accordance with this section (as in effect before November 15, 1990), or to prevent, *taking into consideration costs, energy, safety, and other relevant factors*, an adverse environmental effect. Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, *taking into consideration costs, energy, safety, and other relevant factors*, an adverse environmental effect. . . . "

CAA § 112(f)(2), 42 U.S.C. § 7412(f)(2) (emphasis added).

These remarkably detailed Sections show that, where Congress intended for costs to be considered, it expressed that intent so as to leave no doubt.[6] This is not the case in Section 109(b)(1). While *Cross-Petitioners* spin elaborate

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[6] *Cf. Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*, 824 F.2d 108, 114-115 (D.C. Cir. 1987) ("[W]hen Congress desired agencies to consider economic costs, it knew how to say so, *see American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 510, 101 S.Ct. 2478, 2491, 69 L.Ed.2d 185 (1980); presumably, when Congress desired to permit agencies to consider economic costs, it knew how to say so as well, *see Union Electric*, 427 U.S. at 257 n. 5, 96 S.Ct. at 2525 n. 5.").

theories about how costs of compliance could be considered in setting the NAAQS, Brief of Cross-Petitioners American Trucking Associations, *et al.* ("Cross-Pet. Brf.") at 32-33, examination of the statute shows that *Congress* did not provide any such direction whatever. Given the central position in the clean air scheme of the Act that the NAAQS enjoy, affecting every place and every person in the country, it makes no sense that Congress would have so glaringly omitted directions on how to take costs into account there, while simultaneously providing such meticulous directions in far less central portions of the Act that do not necessarily affect all places and all people. The omission can mean only that Congress did not intend for compliance costs to be taken into account when setting the NAAQS.

A parsing of the text of Section 109 confirms this reading. Section 109(b) provides for the issuance of primary NAAQS only for pollutants for which air quality criteria have been issued. Section 108 provides that these air quality criteria "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutants in the ambient air, in varying quantities." CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2). Section 109(b) requires that NAAQS must be "based on such criteria" together with what the Administrator deems an "adequate margin of safety . . . requisite to protect the public health." CAA § 109(b), 42 U.S.C. § 7409(b). But while the criteria contain detailed, carefully and comprehensively vetted and reviewed scientific and health data and studies, Congress did not order them to contain – and they do not contain – any information about costs. No consideration of costs could possibly be based on the criteria, since data on such costs are simply not there.

Congress was not chary with its instructions as to taking costs into account *when that was what Congress intended*. The utter lack of such guidance in Section 109(b) shows that Congress did *not* intend it as to the setting of

the NAAQS. As the Court recently noted, "Congress could not have intended to delegate a decision of such economic and political significance . . . in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, ___ U.S. ___, 120 S.Ct. 1291, 1315 (2000).

II.

THE TEXT, THE LEGISLATIVE HISTORY, AND THE STRUCTURE OF THE CLEAN AIR ACT ALL DEMONSTRATE CONCLUSIVELY THAT CONGRESS DID NOT INTEND COSTS OF COMPLIANCE TO BE TAKEN INTO ACCOUNT IN SETTING THE NAAQS

Industry argues that the text, structure, and legislative history of the Act all support the view that costs of compliance should be taken into account in setting the NAAQS. On the contrary, each of these factors shows that Congress understood and intended that the NAAQS would be set solely on the basis of protection of health, not costs of compliance.

A. In Enacting the 1970 Clean Air Act, Congress Understood Air Quality Standards That Protect "Public Health" as Being Standards Set Below the Levels at Which Demonstrated Health Effects Occur

Congress' directions as to how the primary NAAQS were to be set are short. Section 109(b)(1) provides:

> "National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated."

CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). Since the Act was passed, the EPA Administrator has interpreted this Section to require that the primary NAAQS be set solely on the basis of health effects information.[7] Courts have also interpreted the Section in the same way.[8] Most importantly, Congress has explicitly and impliedly reaffirmed that it intended the NAAQS to be set on the basis of health.

Cross-Petitioners and their industry *amici* seek to reverse this long-standing, consistent, virtually unanimous interpretation of Section 109. Instead, they attempt to find evidence that has somehow eluded the courts and the Administrator for thirty years that Congress intended the primary NAAQS to be set taking cost of compliance, and societal costs, into account. Cross-Petitioners first cite the requirement in Section 109(b)(1) that the primary NAAQS must be set based on the air quality criteria documents prepared pursuant to Section 108(a), and established at levels "allowing an adequate margin of safety, [that] are requisite to protect the public health." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1).

As Cross-Petitioners correctly point out, the Act itself does not define the term "public health." (Cross-Pet. Brf. at 33-34.) Because there is no statutory definition of the

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[7] *See, e.g.*, 49 Fed. Reg. 6866, 6866-67 and *passim* (Feb. 23, 1984); 52 Fed. Reg. 24634, 24635 and *passim* (July 1, 1987); 53 Fed. Reg. 52698, 52701 and *passim* (Dec. 29, 1988); 58 Fed. Reg. 13008, 13008 and *passim* (March 9, 1993); 62 Fed. Reg. 38856, 38878 and *passim* (July 18, 1997).

[8] *Natural Resources Defense Council v. EPA*, 902 F.2d 962 (D.C. Cir. 1990), *cert. denied sub nom., American Iron & Steel Institute v. EPA*, 498 U.S. 1082 (1991); *American Petroleum Institute v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981), *cert. denied sub nom., American Petroleum Institute v. Gorsuch*, 455 U.S. 1034 (1984); *Lead Industries v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), *cert. denied sub nom., Lead Industries v. EPA*, 449 U.S. 1042 (1980) and *St. Joe's Minerals Corp. v. EPA*, 449 U.S. 1042 (1980); *see also NRDC v. EPA*, 894 F.2d 1146 (D.C. Cir. 1987) (*en banc*).

term, Cross-Petitioners concoct one to suit their liking, a definition that includes the overall effects of regulation on the standard of living of the population in general. They cite as support what they characterize as "[t]he authoritative public health definition" in C.E.A. Winslow's *The Cost of Sickness and the Price of Health*, which they contend defines "public health" as including the effect that regulatory controls may have on the population's "standards of living." *Id.* Cross-Petitioners argue that Winslow, as well as subsequent "scholarly literature" articles, establish that "public health" was a term of art encompassing economic factors at the time the 1970 Act was enacted, and that Congress must have used it with the Winslow definition in mind.

The premise of this argument is pure fiction: Winslow was writing primarily about the horrific effects of communicable diseases such as tuberculosis on the "standards of living" of populations, and in that context, it is clear that he championed health and welfare policies that would improve standards of living by eradicating disease and allowing people to remain healthy. Nothing in the quotation provided by Cross-Petitioners supports their implication that Winslow feared that promotion of health and eradication of disease would lower standards of living if left unchecked by consideration of the costs of such efforts. Moreover, Cross-Petitioners do not even try to show that anyone in the public health field interpreted Winslow's work in that way at any time in the two decades that elapsed between its publication and the adoption of the 1970 CAA by Congress, or indeed that such an opinion was ever held or voiced by any public health scholars or policymakers during that period.[9]

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[9] *See also* Brief of *Amicus Curiae* Environmental Defense and American Public Health Association, on Behalf of Cross-Respondents, at 27-29 (demonstrating that Cross-Petitioners' definition has been taken out of context and that, taken in its entirety, it does not support Cross-Petitioners' argument).

More fundamentally, Cross-Petitioners' argument, even if it might be relevant to establishing what the public health community meant by "public health" in 1970, would still prove nothing whatever about what Congress meant by that term. Cross-Petitioners advance not a single scrap, not a scintilla, of evidence that Congress ever read the Winslow work, or that the committees preparing the Clean Air Act in any way accepted any definition of "public health" that contemplated consideration of compliance costs, or even knew about such a definition. Cross-Petitioners say nothing as to whether Congress intended the term to have the meaning in the Act that Cross-Petitioners argue it had in the public health field. Indeed, the fact that Congress chose in 1968 to take the regulatory apparatus for controlling air pollution *out* of the Public Health Service, where it originally had been, and move it to a new National Air Pollution Control Administration ("NAPCA") in the Consumer Protection and Environmental Health Service of the Department of Health, Education and Welfare[10] is evidence that, if anything, Congress thought that air pollution control should *not* be contained within the traditional public health regulatory framework, but be part of environmental protection. The eventual Congressional ratification of President Nixon's decision to fold NAPCA into the new Environmental Protection Agency lends weight to such a conclusion.

As to the literature to which Cross-Petitioners refer the Court, the articles they cite at pages 35-36, particularly in the lengthy note 1, were written twenty to thirty years *after* the 1970 Clean Air Act was enacted. Cross-Pet. Brf at 35-36, n. 1, 36 in text. They do *not* constitute evidence of what the 1970 Congress actually read, knew, considered, or meant.

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[10] CHARLES O. JONES, CLEAN AIR: THE POLICIES AND POLITICS OF POLLUTION CONTROL 111 (1975).

On the other hand, there is considerable evidence as to what that 1970 Congress actually did know and consider. In *Union Electric Co.*, 247 U.S. 246, at 258-259, the Court determined the intent of Congress as to whether the Administrator may consider the costs of the strategy chosen by a State in its SIP, by quoting the manager of the Senate bill, Senator Muskie, who explained the bill's intent as follows:

> " ' "The first responsibility of Congress is not the making of technological or economic judgments – or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect *the health of persons*. This may mean that people and industries will be asked to do what seems to be impossible at the present time." ' 116 Cong. Rec. 32901-32902 (1970)." (Emphasis added.)

Id. Union Electric went on to quote the Senate Committee Report:

> " 'In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) *the health of people* is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to *public health*.' "

S. Rep. No. 91-1196, 2-3 (1970) (emphasis added), quoted at 247 U.S. 259. These quotes show not only that Congress very explicitly intended for protection of health to trump technological feasibility and cost, they also show that Congress, and the Senate manager of the bill, used the terms "health of persons," "health of people," and "public health" interchangeably, rather than using "public

health" as the narrow term of art for which Cross-Petitioners and their *amici* argue.

In 1990, Congress enacted a change to the Act that constitutes an implicit ratification of the *Lead Industries* interpretation of Section 109(b). The 1990 Amendments enacted Section 107(d)(5), which authorized the Administrator to order the States to designate air quality regions as being in or out of attainment with "the national ambient air quality standard for lead in effect as of November 15, 1990. . . . " That standard is, of course, the one upheld in *Lead Industries*. The designation process, when a region is designated as nonattainment for a standard, begins the entire SIP process as to that region and that pollutant. Congress would hardly have authorized EPA to start this process, which requires the development of control strategies, regulations, and so forth, with regard to the lead standard if it considered that the lead standard had been wrongly set. Congress made very extensive revisions to the Act in 1990, specifying in considerable detail what it did and did not want SIPs to contain. It is inconceivable that Congress enacted this provision, referring to a particular standard ("the national ambient air quality standard for lead in effect as of November 15, 1990"), rather than a more general reference to the NAAQS, without knowing what that lead standard was, and without knowing the D.C. Circuit decision that had affirmed that standard. This is direct evidence that Congress spoke to the particular question at issue here, namely, the validity of the *Lead Industries* decision and the standard it affirmed, and demonstrated its approval.

Besides this statutory provision, the legislative history of the 1990 Amendments also endorses the view embodied in *Lead Industries*. While it is the purview of the courts, and not a later legislature, to interpret a statute, the views of a later Congress as to the meaning of a statutory provision can be considered at least as evidence

of what that later Congress intended.[11] Here, the 101st Congress, second session, in enacting the 1990 amendments to the Act without changing Section 109(b)(1), did not simply leave Section 109 in place and remain silent

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[11] *See, e.g., Staples v. United States*, 511 U.S. 600, 636 (1994) ("[w]hen Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language" (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994) (citing *Lorillard*); *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) (citing *Lorillard*); *Pierce v. Underwood*, 487 U.S. 552, 567 (1988) (citing *Lorillard*); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) ("Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction . . . " (citing *Bob Jones University v. United States*, 461 U.S. 574, 601-602 (1983)); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782, n.15 (1984) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change [citations omitted]. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"); *Id.*, 470 U.S. 768 at 803 (White, dissenting) ("I do not suggest that Congress' inaction in the face of an authoritative statutory interpretation brought to its attention is never probative of the proper interpretation of the statute"); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 846 (1985) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " [Citations omitted.]); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 427 (1985) (same).

about it, Congress affirmatively expressed its interpretation of the correct basis for the primary NAAQS:

> "As defined in the Act, "primary" ambient air quality standards limit the maximum allowable concentration of each criteria pollutant to the level that 'protects the public health' with an 'adequate margin of safety', *without regard to the economic or technical feasibility of attainment*. This means identifying through research *the lowest level at which health effects are observed* and applying a margin of safety to arrive at the ambient standard."

S. Rep. No. 101-228, *reprinted in* 1990 U.S.C.C.A.N. 3385, 3391 (emphasis added). The 101st Congress stated that it viewed a standard that protects public health, as the term was used in the Act, as meaning a standard based on health effects with an additional margin of safety to make the standard even more protective. There is no hint of the definition of "public health" as a term of art encompassing overall economic welfare, and certainly no intent expressed by the 101st Congress that costs of meeting a primary standard were to be a part of the basis for setting that standard; the legislative history is unequivocally to the contrary.

Cross-Petitioners have advanced only speculation and surmise as to the meaning of the phrase "public health" as their textual support for their position. The overwhelming weight of both text and legislative history is to the contrary, and supports Cross-Respondent here.

B. Requiring the Administrator to Provide Nuts-and-Bolts Control Technology Information to the States, and the Role of CASAC in Evaluating the Relative Effects of Different Control Strategies, In No Way Mandates That the Administrator Consider Costs in Setting the NAAQS. On the Contrary, They Are Part of the Federal-State Partnership Set Up by the Act.

Industry makes two other purportedly "textual" arguments, contending that two other provisions of the Act require consideration of costs: First, that Section 108(b), which requires that the Administrator give control technology information to the States; and second, that Section 109(d)(2)(B), which requires that the Clean Air Scientific Advisory Committee ("CASAC") advise the Administrator as to strategic considerations for *achieving* the NAAQS, somehow also requires the Administrator to consider costs in *setting* the NAAQS. Both arguments are wrong.

Section 108(b) calls solely for the Administrator to "issue *to the States and appropriate air pollution control agencies* information on air pollution control techniques," including data on cost of installation and energy and environmental effects of a proposed NAAQS at the same time that the Administrator proposes it. CAA § 108(b), 42 U.S.C. § 7408(b) (emphasis added). Section 109(d)(2)(C) requires that the Administrator appoint the CASAC to advise her regarding new NAAQS, and especially about the "adverse public health, welfare, social, economic or energy effects which may result from various strategies for attainment of such national ambient air quality standards." CAA § 109(d)(2)(C), 42 U.S.C. § 7409(d)(2)(C). Neither of these provisions mandates that the Administrator consider costs in setting the NAAQS; rather, both should be read in the context of the federal-State partnership created by the Act.

Each of these provisions lies outside of Section 109(b)(1), which is the only Section that explicitly sets

out the basis upon which the NAAQS are to be set. As the Court held in *Union Electric*, 246 U.S. 246 at 257, where Congress sets out a definitive list of factors upon which the Administrator is to make a decision under the Act, the Administrator is limited to that list. ("The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified. . . . ") *Id.* Here, Congress did specify the factors the Administrator is to consider, and the information required under Sections 108(b) and 109(d)(2) is not among them. Further, it is not reasonable to read "criteria" as referring to anything other than the Section 108(a) criteria documents. Subsection (a) speaks, in 109(a)(1)(A), of national ambient air quality standards "for which air quality criteria have been issued" before December 1, 1970, and 109(a)(2) refers to national standards being adopted "with respect to any air pollutant for which air quality criteria are issued after December 31, 1970." CAA § 109(a)(1)(A), 42 U.S.C. § 7409(a)(1)(A). Section 109(a)'s references to ambient air quality standards for which air quality criteria have been *issued* cannot be read as anything other than a plain reference to the air quality criteria documents that are issued under Section 108, without doing violence to the meaning of both Sections. Moreover, Section 109(b)(1) directs the Administrator to base the national primary and secondary air quality standards, "prescribed under subsection (a) of this section," on "such criteria." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). This Section can be read only as referring to the Section 108(a) air quality criteria, the only "criteria" relevant to section 109 and the only criteria that are "issued" under the Act. "Criteria" in this context is a term of art under the Act, and is used as such in Sections 109(a)(1) and 109(b). *Natural Resources Defense Council v. EPA*, 902 F.2d 962, 967, 973 (D.C. Cir. 1990), *cert. denied sub nom., American Iron & Steel Institute v. EPA*, 498 U.S. 1082 (1991).

Since Congress has itself listed the factors upon which the NAAQS are to be based, and these factors do

not include Sections 108(b) or 109(d), Congress did not intend the Administrator to consider those factors.

Beyond these textual arguments, Section 108(b) and Section 109(d) can only be correctly understood in the context of the federal-State partnership that permeates the Act. Having made the decision to assign to the States the difficult decisions about what control strategies to adopt, and how to carry them out, Congress concomitantly decided to give the States all the help it could. Congress authorized monetary grants to the States to assist them, CAA § 175, 42 U.S.C. § 7505, and was extremely liberal in mandating the supplying of information and technical assistance to the States. The Act is filled with requirements that EPA provide technical information and assistance to the States in their formidable task of actually crafting the plans that will clean the air. *See, e.g.*, CAA §§ 178, 182(a)(2)(A), 182(a)(3)(B), 182(b)(2), 183(a), 190, 42 U.S.C. §§ 7508, 7511a(a)(2)(A), 7511a(a)(3)(B), 7511a(b)(2), 7511b(a), 7513b.

Plainly, Congress perceived the enormity of the task it was assigning to the States, and gave them every tool and bit of information it could to assist them in that task. The 1970 Act allowed only 30 to 90 days for the Administrator to adopt the first NAAQS, and gave the States only three short years beyond that time (or a shorter period, at the Administrator's discretion), to develop, adopt, and submit the first SIPs, an astonishingly short time for such a massive undertaking. CAA § 110(a)(1), 42 U.S.C. § 7410(a)(1). The Court early on recognized that "Congress imposed upon the States a comprehensive planning task of the first magnitude which was to be accomplished in a relatively short time" when it passed the 1970 Act. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 68 (1975). It is in this light that Sections 108(b) and 109(d)(2)(C) must be seen. Section 108(b) requires the Administrator, when issuing the criteria documents upon which NAAQS will be based, simultaneously to give to

the States information about air pollution control technology, energy requirements, cost, and other technical information. CAA § 108(b), 42 U.S.C. § 7408(b). The provision of this nuts-and-bolts information was intended by Congress to assist the States in starting to devise their control strategies and their SIPs. Cross-Petitioners cavalierly assert that reading Section 108(b) as mandating provision of information to the States for any purpose other than commenting on a proposed NAAQS (e.g., to provide it to them to assist in SIP planning) would be "inexplicably premature." Cross-Pet. Brf. at 40. *Amici* States can only observe that Cross-Petitioners have never tried to draft a SIP if they think this is a short time. The Section 108(b) advice is not premature: it now precedes the highly complex SIP by four to five years, and it was absolutely imperative in 1970 when the Section was enacted and States had only three years.

Similarly, the advice that Section 109(d)(2)(C) mandates CASAC to give to the Administrator as to the relative effects of "various *strategies*," CAA § 109(d)(2)(C), 42 U.S.C. § 7409(d)(2)(C) (emphasis added), to attain a specific NAAQS, can only be correctly understood as part of this federal-State partnership. The information is given to the Administrator so that she may serve as a central clearinghouse, passing that information in turn to the States, and to make the Administrator aware of what additional technical guidance and assistance the States might need as they chose the strategies that only they are authorized to choose to meet the NAAQS.

Cross-Petitioners argue that because CASAC must advise the Administrator about social and economic effects of strategies to meet the NAAQS, the Administrator must add such effects to the list of factors set out in Section 109(b)(1) as the basis for the NAAQS. To accept this argument, the Court must conclude that Congress intended to add to the apparently exclusive list of factors

in Section 109(b)(1) without so stating, either in the text or the legislative history.[12]

The Court would also have to conclude that Congress chose an extraordinarily inept method to obtain the intended result. Section 109(d)(2)(A) specifies that CASAC is a *scientific* review committee, not a cost-benefit review committee or an economics review committee. The legislative history supports that limitation, as the House report states:

> "Since the main function of the scientific review committee is to assess the *health and environmental effects of ambient air pollution*, it is anticipated that all seven members would be selected on the basis of their special expertise in the fields of environmental toxicology, epidemiology and/or clinical medicine, or in the fields of environmental or ecological systems."

H.R. REP. NO. 294, 95th Cong., 1st Sess. 179-84 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1258-62 (emphasis added). Section 109(d)(2) particularly specifies that CASAC should include at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies. Had Congress actually intended CASAC to provide information and advice to the Administrator on the costs of removing air pollution from the air, it would presumably have directed that specialists in costs and economic effects at least be represented on the committee. It did not. On the contrary, as Congress "anticipated that all seven members would be selected on the basis of their special expertise in the

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[12] Rather, the language quoted from the House Report explicitly says that CASAC is to assess the health and environmental effects of air pollution "in the ambient air." This echoes the language of Section 108(a)(2) requiring the criteria documents to indicate the health or welfare effects that may be expected "from the presence of such pollutants in the ambient air." It is the effects of pollution, not pollution control, that CASAC is primarily to address.

fields of environmental toxicology, epidemiology and/or clinical medicine, or in the fields of environmental or ecological systems," it can fairly be said that Congress intended that *none* of the seven members be an economics specialist. While one member of CASAC should be a State air pollution control official, the mere presence on CASAC of a State air pollution control official would be a singularly obtuse method for Congress to express an intent to require the Administrator to take costs into account in setting the NAAQS.

Viewed within the federal-State partnership, CASAC's role in providing information and advice on various strategies to meet the NAAQS becomes obvious: it is to gather information on possible control strategies, evaluate it, and pass it on to the States, via the Administrator (it would make little sense for CASAC to try to furnish it directly to the fifty States severally, rather than using EPA's established lines of communication to the States). The key is Section 109(d)(2)(C)'s emphasis on *strategies* to meet proposed NAAQS. Within the split of responsibilities set up by the Act, the Administrator cannot, herself, choose those strategies. Information on the comparative effects of different strategies could not guide her in setting a NAAQS, since she could not know which strategy any given State might actually choose among the various strategies about which CASAC had given advice. The entities to which such information is most useful are the States themselves. Just as the Administrator is required to give States a wide variety of information and assistance under various parts of the Act. so in Section 109(d)(2)(C) Congress made one more provision for supplying information that could assist the States in their assigned role in the federal-State partnership. It in no way indicates any intention by Congress that the NAAQS themselves be based on costs.

III.

BASING THE NAAQS ON COST ESTIMATES MADE AT THE TIME OF STANDARD SETTING WOULD COMPROMISE THE HEALTH-PROTECTIVE INTENT OF CONGRESS, SINCE TECHNOLOGICAL AND REGULATORY CLIMATE CHANGES PRODUCE COST REDUCTIONS THAT ARE NOT FORESEEABLE WHEN NAAQS ARE SET

Besides the textual and legislative history considerations set forth above, there is another, very practical, reason why the NAAQS should not be set taking costs of compliance into account: the Administrator cannot predict with any accuracy in advance what the costs of compliance will be. Attempts to do so could well overstate costs and tend to support standards that are not stringent enough to accomplish Congress' intent to protect the public health.

The first reason that the Administrator cannot predict costs in advance is that, as stated *supra*, the NAAQS are not self-executing. There is no plan to meet them, there are no costs to compute, no one can know what technology will really be required of what industries, until the States devise and draft their SIPs and the SIPs go through the Act's approval process. At the time a NAAQS is set, the Administrator could only guess at how fifty different States would choose to meet that NAAQS, and then make estimates based on guesses, projected into an uncertain future, of what those inchoate and unpredictable SIPs might cost to carry out.

The second reason is that, even where it initially appears that the technology and its costs are known in advance, they very often are not and cannot be gauged with any reliability.[13] The history of the Clean Air Act,

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[13] *See* David Driesen, *Should Congress Direct the EPA to Allow Serious Harms to Public Health to Continue?: Cost-Benefit Tests and the Clean Air Act*, 11 Tul. Envtl. L. J. 217, 227-231 (1998).

and other environmental statutes, has proven that costs of compliance are inherently unknown and unknowable in advance, because technology changes.

It is virtually certain that the adverse health effects of air pollution will not change. The human lungs, heart, and other organs will continue to react to air pollution as they have done in the past, in the ways demonstrated in the health studies that have made up the criteria documents. If anything, our advancing scientific understanding of these health effects may show more effects, and more subtle effects, from air pollution in the future than those of which we now know. On the other hand, it is virtually certain that the technology available to meet the NAAQS *will* change, will become more effective and cheaper over time. Such was the clear intent of Congress, and such has been the history of the Clean Air Act over thirty years.

The Court has recognized "the technology-forcing character of the [1970] Amendments." *Train v. Natural Resources Defense Council*, 421 U.S. at 91. That Congress intended the Act to force technology appears in the legislative history. For example, the 1970 Conference Report says of automotive emissions standards:

> "The House bill did not amend the provisions of existing law relating to the establishment of standards for new motor vehicles. The Senate amendment deleted the requirements that such standards be based on a test of technical and economic feasibility, and provided statutory standards for passenger cars and required that such standards be achieved by a date certain. . . . The conference substitute follows substantially the Senate amendments. . . . The effective date of the standards is to depend on the period necessary to develop the requisite technology giving appropriate consideration to the cost of complying by that date."

CONF. REP. NO. 91-1783, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 5374, 5381. The emissions

standards themselves for passenger cars were to be set to achieve a level of emissions reduction specified in the statute itself, and need not be based on technical feasibility or cost; cost was to be taken in account only in determining the final deadline. *Id.* The statutory standards set by the 1970 Act were formidable: a 90% reduction in some pollutants from the 1970 emission levels by 1975.

However, the commitment of the Congress in the Act to force technology went beyond the automotive industry. As Senator Muskie stated in introducing the bill that would become the 1970 Clean Air Act:

> "The first responsibility of Congress is not the making of technological or economic judgments or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met. I am convinced they can be met."

Remarks of Senator Muskie, quoted by Senator Kerry in 136 CONG. REC. S2826-01, S2835 (1990). The Conference Report for the 1977 amendments reiterated the theme:

> First, and foremost, protection of the public health remains the paramount purpose and value under the Act. Consideration of costs, energy, and technology is expressly authorized or required in many sections of the bill, but the overriding commitment of the 1977 Act (just as the 1970 legislation) is to the protection of public health. Second, this year's legislation *retains and even strengthens the technology forcing and technology encouraging goals of the 1970 Act.*

123 CONG. REC. H8662, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.C.C.A.N. 1570 (emphasis added).

The 1970 automobile emissions standards are perhaps the most convincing example of the success of this technology-forcing strategy. While auto manufacturers denounced the 1970 Act's requirement of a 90% reduction in emissions by 1975,[14] predicting compliance costs of a magnitude that would "do irreparable damage to the U.S. economy," the emissions reduction mandate of the Act forced the development of the catalytic converter, and standards that had been considered impossible to meet were met, if a little late,[15] and without the economic harm that industry had predicted. One noted authority on the Clean Air Act has stated flatly that in the 1980s, "motor vehicles were designed around the applicable emissions limits."[16]

There are similar well known examples, such as the cost of meeting regulations to reduce usage of ozone-depleting chlorofluorocarbons. Raytheon originally asserted that it simply could not find replacements for these solvents in cleaning electronic circuit boards at any cost; however, under the press of legal requirements, Raytheon found a replacement that not only *lowered* production costs, but increased consistency of product quality.[17] In the field of occupational health, such situations have been common.[18] Experience has shown that the costs of compliance cannot be predicted in advance

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[14] Michael Weisskopf, *Auto-Pollution Debate Has Ring of the Past; Despite Success, Detroit Resists*, Washington Post, March 26, 1990.

[15] CAA § 211, 42 U.S.C. § 7545.

[16] Arnold Reitze, *Mobile Source Air Pollution Control*, 6 Envt'l Lawyer 309, 327 (2000).

[17] Porter and van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 Journal of Econ. Persp. 97, 101 (1995).

[18] *See* Goodstein and Hodges, *Polluted Data*, The American Prospect, No. 35, 64-66 (Nov.-Dec. 1997).

because technology will change in response to the level of stringency the standards impose.

Third, costs of meeting health-based NAAQS also cannot be predicted because technology is not the only thing that develops and evolves under the pressure of legal mandates to meet health-based NAAQS. The regulatory climate itself changes, as regulators turn to control of sources that have not traditionally been controlled, but whose pollution contributions are significant percentage amounts of the total pollutant load. The 1990 Clean Air Act Amendments reflects such a change in the regulatory climate: recognizing the need for additional pollution reductions to meet the NAAQS in nonattainment areas, Congress for the first time ordered the Administrator to develop control technique guidance documents for sources whose control was not anticipated when the first NAAQS were adopted, including paints and coatings, solvents, and consumer products. CAA §§ 183(b), (e), 42 U.S.C. §§ 7511b(b), (e).[19] While States are not obliged to use these control options, the mere fact that they are now considered options opens the potential for reduction in overall costs of meeting the NAAQS.

Control of additional source categories potentially offers State regulators a way to reduce emissions without requiring large, traditionally regulated industries to develop yet more costly techniques to remove very small increments of remaining pollution. Since it is usually the first pollution controls applied that procure the largest emissions reduction for the cheapest price, the discovery of new source categories whose emissions could be cut back can reduce the overall costs of attaining the NAAQS.

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[19] In the South Coast Air Quality Management District in California, which includes the Los Angeles area, controls have been enacted on pleasure boats, airport ground vehicles, and bakeries, all sources whose control was not anticipated even a few years before. Daniel Selmi, *Impacts of Air Quality Regulation on Economic Development*, 13 Fall Nat. Resources & Env't 382 (1998).

Such changes in the regulatory climate, in the perception of who and what can and should be regulated, cannot always be foreseen when health-based standards are adopted, but can reduce costs of compliance in ways not expected or accounted for in cost estimates made before the shift in the regulatory climate occurs.

CONCLUSION

Amici States respectfully ask the Court to affirm the decision below in its holding that the Administrator may not consider costs of compliance in setting NAAQS, thereby also affirming the expressed intent of Congress to make this nation's air clean and safe to breathe.

Respectfully submitted,

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